A

KETUA SETIAUSAHA KEMENTERIAN DALAM NEGERI & ANOR v. SALCONMAS SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
HADHARIAH SYED ISMAIL JCA
B SUPANG LIAN JCA
[CIVIL APPEAL NO: W-01(NCC)-158-03-2020]
15 JULY 2022

C **Abstract** – *Challenge, if any, to the jurisdiction of an arbitrator, must be raised during the arbitration proceedings, and not at the court hearing. Failure to state the objection on the composition of the arbitral tribunal before the arbitrator, constitutes a waiver of the right to object.*

D ***ARBITRATION:*** *Agreement – Reference of dispute – Legality of arbitrator's appointment – Whether issue res judicata – Whether issue ventilated in previous proceedings – Whether objection on arbitrator's appointment ought to have been raised before arbitrator – Whether failure amounted to waiver of right to object – Whether final award in conflict with public policy – Whether element of 'conflict with public policy' satisfied – Arbitration Act 2005, ss. 7, 18 & 37(1)(b)(ii)*

E The appellants, together with another company and the respondent, entered into a privatisation agreement, which was conditional upon the respondent fulfilling condition precedent stipulated in cl. 2 of the agreement. However, the respondent failed to fulfil the condition precedent. Nine years later, the
F appellants terminated the agreement and informed the respondent that the agreement was unenforceable and no longer binding on the parties. The respondent disputed the termination and requested the formation of a Dispute Resolution Committee, under cl. 27 of the agreement, to settle the dispute through arbitration. The appellants rejected the request. The respondent wrote a letter to the appellants to refer the dispute to arbitral
G tribunal and proposed one En Ameir Hassan as the sole arbitrator. There was no reply. The mechanics of cl. 28(2) of the agreement provided that any party could make an application to the Director of AIAC for the nomination of the arbitrator. However, there was no reference made for such nomination. Instead, the respondent filed originating summons ('Kangar first OS') for an
H order to refer the dispute to arbitral tribunal and to appoint En Ameir Hassan as the sole arbitrator. The application was allowed and was not appealed against by the appellants. However, before the hearing of the arbitral proceedings, the appellants filed an OS ('KL first OS') wherein the application, *inter alia*, to set aside the Kangar first OS, was allowed and the
I arbitration proceedings was put to a stop. The KL first OS was subsequently set aside by an application filed by the respondent in Kangar second OS. The

appellants' appeal to the Court of Appeal against the decision was dismissed. Thereafter, the arbitral proceedings proceeded wherein, the arbitrator, in issuing the final award in favour of the respondent held, *inter alia*: (i) the condition precedent was waived and not binding on both parties; (ii) that the termination of the agreement due to the non-compliance of the condition precedent was unlawful; and (iii) allowing the respondent's claim. Aggrieved by the final award, the appellants applied to set it aside under s. 37 of the Arbitration Act 2005 ('AA') ('KL second OS'). The application was dismissed and hence, this appeal by the appellants on the following issues: (i) whether the issue on the appointment of arbitrator was *res judicata*; (ii) whether the High Court Judge ('HCJ') erred in holding that the appellants had waived the right to challenge the arbitral tribunal's composition because the appellants did not raise the issue before the arbitrator, under s. 18 of the AA; and (iii) whether the HCJ erred in holding that the appellants had failed to prove that the final award was in conflict with public policy.

Held (dismissing appeal)
Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

(1) The issue on the legality of the arbitrator's appointment was *res judicata*. The appellants had raised and argued the appointment issues three times, in the KL first OS, the Kangar second OS and in the Court of Appeal. There was no merit in the appellant's contention that in all the previous suits, the court had never determined the issue that the arbitrator's appointment was not in accordance with cl. 28.2 of the agreement. On the contrary, the contravention of cl. 28.2 formed the foundation of the appellants' application to set aside the Kangar first Order. Further, the HCJ, by deciding on a matter that was not pleaded, had acted beyond her jurisdiction, and therefore, the decision that *res judicata* did not apply on the issue of the arbitrator's appointment was an error of law and was thus set aside. (paras 28 & 34)

(2) Any objection pertaining to the arbitrator's appointment and his jurisdiction must be raised before the arbitrator. The appellants, by failing to raise any objection before the arbitrator, had not complied with ss. 7 and 18(1) of the AA. Therefore, the HCJ did not err in deciding that the appellants had waived their right to object on the arbitrator's jurisdiction in the KL second OS. (paras 40 & 42)

(3) The appellants, despite having applied to set aside the final award under s. 37(1)(b)(ii) of the AA, failed to satisfy the element of 'conflict with public policy'. The appellant failed to explain in what way the final award was said to create patent or substantial injustice or was manifestly unlawful and unconscious to the extent of conflicting against the public policy in Malaysia. The appellants had also failed to prove that the most

basic notions of morality and justice would be offended by the award and that the conflict was something injurious to the public good in Malaysia. There was thus no merit in the issues raised by the appellant. (paras 49 & 50)

Case(s) referred to:

Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***
Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd [2017] 4 CLJ 1 FC ***(refd)***
Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***
Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 7, 13(6), (7), 18(2), 37(1)(b)(ii)

For the appellants/plaintiffs - Zureen Elina Mohd Dom, Nur Ezdiani Roseb & Nurul Atiqah Azizan; A-G Chambers
For the respondent/defendant - Zambri Ibrahim; M/s Zamri Ibrahim & Co

[Editor's note: For the High Court judgment, please see Ketua Setiausaha Kementerian Dalam Negeri & Anor v. Salconmas Sdn Bhd [2020] 1 LNS 422 (affirmed).]

Reported by S Barathi

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

[1] The appeal by the appellants (the plaintiffs) is against the decision of the High Court dated 14 February 2020, in dismissing the appellants' application to set aside the arbitral final award with costs of RM10,000.

[2] We heard the appellants' and the respondent's submissions on 29 September 2021 and unanimously dismissed the appeal.

Background Facts

[3] On 30 October 2004, the appellants together with one company named Syarikat Tanah dan Harta Sdn Bhd and the respondent (defendant) entered into a privatisation agreement (the agreement) to develop a new General Operations Force (Pasukan Gerakan Am (PGA)) Complex in Sibu and Limbang with the contract sum of RM68,100,000 through land swap (the project).

[4] The agreement is conditional upon the respondent fulfilling the condition precedent stipulated in cl. 2 of the agreement which reads as follows:

> 2. Condition Precedent
>
> 2.1 This Agreement is conditional upon the Company's fulfilment of the following conditions precedent:
>
> (a) The Company shall prior to the commencement date acquired Project Land 2B at its own risks, costs and expenses; and
>
> (b) Submit to the Government the appropriate documents evidencing to the satisfaction of the Government that the company has fulfilled the condition specified in clause 2.1 (a) above;
>
> Within six (6) months from the Execution Date.
>
> 2.2 … In the event the company fails to transfer Project Land 2B within the specified period or such other period as may be agreed in writing by the Government this Agreement may be terminated in accordance with clause 22.2.

[5] It is not in dispute that the respondent had failed to fulfil the condition precedent.

[6] Nine years later, the appellants terminated the agreement through a letter dated 20 August 2013. The appellants informed the respondent that the agreement is unenforceable and no longer binding on the parties as the respondent had failed to fulfil the condition precedent.

[7] The respondent disputed the termination and wrote a letter to the appellants dated 3 November 2014 requesting the formation of a Dispute Resolution Committee under cl. 27 of the agreement to settle the dispute through arbitration. However, the appellants through a letter dated 6 January 2015 rejected the request on reason that the agreement was no longer effective and that all the clauses therein were no longer applicable and not binding on the parties.

[8] The procedure for appointing an arbitrator is specifically provided in cl. 28.2 of the agreement and it reads as follows:

> 28.2 Any matter, dispute or claim referred to arbitration pursuant to clause 28.1 shall be referred to an arbitrator to be agreed by the relevant parties or, failing agreement, to be nominated on the application of any of the relevant parties by the Director of Regional Centre for Arbitration in Kuala Lumpur ...

[9] The respondent's solicitor then wrote a letter dated 12 December 2016 to the appellants to refer the dispute to arbitral tribunal and proposed En Ameir bin Hassan as sole arbitrator. There was no reply by the appellants to the said letter.

[10] Therefore, in default of parties' agreement on an arbitrator, the mechanics of cl. 28.2 would require any party to make an application to the Director of AIAC for the nomination of the arbitrator.

[11] It is an undisputed fact that no reference was made to the KLRCA in respect of the nomination of an arbitrator.

[12] Instead, on 13 February 2017, the respondent filed Originating Summons No. 24-NCVC-23-02-2017 at Kangar High Court, Perlis (Kangar first OS) applying for an order to refer the dispute to arbitral tribunal and to appoint En Ameir bin Hassan as sole arbitrator. The appellants did not file affidavit in reply. On 21 April 2017, the learned Judicial Commissioner (JC) allowed the respondent's application (Kangar first order). The appellants did not appeal against the Kangar first order.

[13] The first arbitral meeting was held on 15 August 2017 wherein the arbitrator fixed the hearing dates from 12 February 2018 to 16 February 2018. Both parties filed their respective pleadings, bundle of documents and witness statements in preparation for the hearing.

[14] However, on 30 January 2018, the appellants filed Originating Summons No. WA-24-NCVC-195-01-2018 at the Kuala Lumpur High Court (KL first OS) and applied for the following orders:

(i) Declaration that the arbitral proceeding contravenes cl. 28 of the agreement;

(ii) Declaration that the Kangar first order appointing Encik Ameir bin Hassan as the arbitrator is null and void;

(iii) That the Kangar first order be set aside; and

(iv) That all arbitral proceeding be stayed pending disposal of the KL first OS.

[15] On 14 March 2018, the Kuala Lumpur High Court Judge allowed the appellants' application (KL order) and the arbitral proceeding was put to a stop.

[16] The respondent then filed Originating Summons No. RA-24C-(ARB)-2-03-2018 at the Kangar High Court (Kangar second OS) applying for the following orders:

(i) Declaration that the KL Order contravenes ss. 8, 14, 15, 18, 23 and 34 of the Arbitration Act 2005 and void.

(ii) That the KL Order be set aside.

[17] On 26 April 2018, the Kangar High Court allowed the respondent's application (Kangar second order). The appellants appealed against the Kangar second order to the Court of Appeal. The appeal was dismissed on 8 November 2018. There was no further appeal by the appellants.

[18] The appellants and the respondent proceeded with the arbitral proceeding wherein on 9 August 2019, the arbitrator issued a final award in favour of the respondent.

[19] In the final award, the arbitrator held *inter alia*:

(i) That the condition precedent was waived and not binding on both parties.

(ii) That the termination of the said agreement due to the non-compliance of the condition precedent is unlawful.

(iii) Allowing the respondent's claim as follows:

Claim		Amount
a. Loss of profit	–	RM144,730,780
b. Miscellaneous cost incurred	–	RM100,000
c. Punitive and Exemplary Damages	–	RM1,000,000
Total	–	RM145,830,780

[20] Aggrieved by the said final award, the appellants applied *via* Originating Summons No. WA-24 NCC-(ARB)-45-10-2019 at the Kuala Lumpur High Court (KL second OS) to set aside the final award under s. 37 of the Arbitration Act 2005 (the Act) on the following grounds:

(i) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(ii) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties; and

(iii) the award is in conflict with the public policy of Malaysia.

High Court Decision

[21] On the issue of the composition of the Arbitral Tribunal, the learned High Court Judge decided that in view of the implicit acceptance by the court in the second Kangar OS of the fact that the appointment of the arbitrator was indeed contrary to the agreement of the parties, Her Ladyship took the view that special circumstances exist as to why the doctrine of *res judicata* in the wider sense should not apply in the present case. Despite this ruling, the learned judge finds the failure of the plaintiffs to raise the issue of the composition of the Arbitral Tribunal pursuant to s. 18 of the Act constitutes a waiver of the right to raise the issue that the composition of the Arbitral Tribunal is not in accordance with the agreement of the parties.

[22] On the issue of public policy, the learned judge found the plaintiffs have failed to prove the final award is in conflict with public policy.

[23] As the claim for miscellaneous expenses was not pleaded, the nominal award of RM100,000 by the arbitrator was set aside for not falling within the terms of submission to the arbitration.

[24] Save and except for setting aside the award of RM100,000, the appellants' claim was dismissed.

The Issues

[25] The appellants raised three issues in this appeal:

(i) whether the issue on the appointment of the arbitrator is *res judicata*;

(ii) whether the learned High Court Judge has erred in holding that the appellants have waived the right to challenge the Arbitral Tribunal's composition because the appellants did not raise the said issue before the arbitrator under s. 18 of the Act;

(iii) whether the learned High Court Judge has erred in holding the appellants have failed to prove that the final award is in conflict with public policy.

First Issue

[26] The appellants submit that the appointment of the arbitrator and the composition of the Arbitral Tribunal was in contravention of cl. 28.2 of the privatisation agreement. It is also submitted that the issue on the appointment of the arbitrator and the composition of the Arbitral Tribunal was not *res judicata* because there was never any determination made pertaining to the composition of the Arbitral Tribunal under cl. 28.2 of the agreement in all the previous suits and appeal.

[27] In response, the respondent submit that the issue on the appointment of En Ameir bin Hassan as the arbitrator is *res judicata* in the sense that the fact has been finally decided and the appellants cannot relitigate the same issue in other proceeding; see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189; *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062. The facts giving rise to *res judicata* are as follows:

(i) The application to appoint En Ameir bin Hassan as arbitrator was made in the Kangar first OS. Therefore, any issue pertaining to the appointment should be raised in the Kangar first OS. But the appellants did not file affidavit in reply. In other words, the appellants elected not to participate in the Kangar first OS. When the Kangar High Court allowed the respondent's application on 21 April 2017 (Kangar first order), the appellants did not appeal against the decision.

(ii) Instead, the appellants challenged the appointment of the arbitrator *via* KL first OS on the ground the appointment contravened cl. 28.2 of the agreement and s. 13(6) & (7) of the Arbitration Act 2005 (the Act). The legality issue on the appointment was raised and argued by the appellants in KL first OS and was accepted by the KL High Court. On 14 March 2018, the KL High Court set aside the Kangar first order (KL order).

(iii) In retaliation, the respondent applied to set aside the KL order *via* Kangar second OS. Again, the appellants raised and argued the legality issue of Kangar first order. 26 April 2018, the Kangar High Court allowed the respondent's application (Kangar second order).

(iv) Aggrieved, the appellants appealed against the Kangar second order to the Court of Appeal.

Again, the appellants argued on the legality of the arbitrator's appointment by the Kangar High Court. The appellants' appeal was dismissed by the Court of Appeal. There was no further appeal by the appellants. This means the appellants have accepted the decision in the Kangar second OS.

(v) The decision in the Kangar second OS means the Kangar first order appointing En Ameir bin Hassan as arbitrator remain intact, valid, final and binding on the parties.

[28] Based on the background facts, we agree with the respondent that the issue on legality of the arbitrator's appointment is *res judicata*. The appellants had raised and argued the appointment issue three times *ie*, in the KL first OS, the Kangar second OS and in the Court of Appeal. We find no merit in the appellants' contention that in all these previous suits, the court never determined the issue that the arbitrator's appointment was not in accordance with cl. 28.2 of the agreement. To the contrary, we find contravention of cl. 28.2 of the agreement formed the foundation of the appellants' application to set aside the Kangar first order.

[29] After the final award was issued, the appellants filed KL second OS to set aside the final award. Again, for the fourth time, the appellants raised the issue on the arbitrator's appointment giving the same reason that was raised in the KL first OS, Kangar second OS and in the Court of Appeal.

[30] At paras. 25, 29, 30, 34 and 35 of the judgment, the learned High Court Judge ruled that the appointment and the composition of the Arbitral Tribunal was not *res judicata* based on the following:

(i) It was implicitly accepted by the Judicial Commissioner (JC) in Kangar second OS that the appointment of the arbitrator was contrary to the agreement.

(ii) The appellants were precluded from raising the issue of law during Kangar first OS.

(iii) The appellants' notice of application to strike out Kangar first OS was not heard.

(iv) The appellants had tried to raise the issue in their striking out application but the court did not allow the appellants to be heard first. The appellants were not to blame for not being able to raise this issue in the Kangar first OS and because of that the doctrine of *res judicata* in the wider sense should not apply.

[31] The respondent submit the learned High Court Judge has erred in deciding *res judicata* does not apply for the following reasons. First, it is submitted that it is not true that the learned JC in Kangar second OS had agreed that the arbitrator's appointment was not in accordance with the agreement. The learned JC was merely quoting the reason given by the KL High Court in setting aside the Kangar first order. It is obvious that paras. 19 and 20 of the learned JC's grounds of judgment referred to by the learned High Court Judge to justify her decision that *res judicata* does not apply was misconstrued by the learned High Court Judge.

[32] The second reason is the notice of application for striking out was not served on the respondent and was abandoned by the appellants. So, there was no issue of the appellants being denied an opportunity to raise the issue. Thirdly, the notice of application was not pleaded in the KL second OS but raised by the appellants during clarification on 30 January 2020. However, the learned High Court Judge still proceeded with the non-pleaded notice of application and used it to justify her decision that the issue of the appointment of the arbitrator is not *res judicata*. It is submitted that parties are bound by their pleadings and the court is not entitled to decide a suit on a matter that is not pleaded. In support of that proposition, the respondent cited *Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd* [2017] 4 CLJ 1; [2017] MLJU 194 wherein the Federal Court held that cases must be decided on the issue on the record.

[33] In *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773, the Court of Appeal held that the court is not entitled to decide a suit on a matter that is not pleaded. And when the trial court decides on an issue that is not pleaded, the judgment can be set aside.

[34] We have perused the KL second OS and find the notice of application was indeed not pleaded. On the authority of *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773, we agree with the respondent that the learned High Court Judge had acted beyond her jurisdiction by deciding on matter that was not pleaded. Therefore, Her Ladyship's decision that *res judicata* does not apply on the issue of the arbitrator's appointment is an error of law and is set aside.

Second Issue

[35] During the hearing of the KL second OS to set aside the final award, the appellants raised the issue that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. But this issue was not raised in the arbitral proceedings. It is a disputed fact that the appellants had submitted and participated in the arbitral proceeding until the final award was issued without raising any objection over the appointment of the arbitrator.

[36] Section 18(1) of the Arbitration Act 2005 provides:

> Competence of arbitral tribunal to rule on its jurisdiction 18(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

[37] In *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417, the Federal Court held:

> [40] A challenge to the jurisdiction of an arbitrator must be made during the arbitration proceedings itself, but not at the court hearing an application for a stay under section 10(1). It is the arbitrator who decides the issue of jurisdiction. Any ruling of the arbitration that it has jurisdiction can be appealed to the High Court which will finally decide the matter.

[38] The appellants took the position that since the arbitrator's appointment was not made in accordance with the provisions of the law, his appointment is a nullity and the arbitrator himself is not competent to conduct the arbitral proceedings. In the circumstances, the appellants submit that the court cannot invoke s. 18(1) of the Act when the foundation of the arbitration proceedings itself is null and void.

[39] The respondent submits that the failure of the appellants to state their objection to the composition of the Arbitral Tribunal not complying with the agreement before the arbitrator constitutes a waiver of rights to object as provided under s. 7 of the Act which reads:

> 7. Waiver of right to object
>
> A party who knows:
>
> (a) of any provision of this Act from which the parties may derogate; or
>
> (b) that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived its right to object.

[40] We disagree with the appellants' submission. The law is trite. Any objection pertaining to the arbitrator's appointment and his jurisdiction must be raised before the arbitrator. The High Court in Kangar second OS has held that any challenge to the arbitrator's jurisdiction must be made before the arbitrator under s. 18(1) of the Act. The decision in the Kangar second OS was upheld by the Court of Appeal.

[41] The learned High Court Judge in the KL second OS agree with the respondent that the appellants' failure to raise any objection before the arbitrator under s. 18(1) of the Act constitutes a waiver of its rights to object to the jurisdiction of the arbitrator in the application to set aside the final award. Her Ladyship's decision is stated in paras. 48, 49 and 51 of the judgment as follows:

> 48. Since the decision in the 2nd Kangar OS was upheld by the COA, it must be accepted that the COA agreed with the High Court that any challenge to the jurisdiction of an arbitrator must be made before the arbitrator as provided under section 18 (1) of the Act. Since the plaintiffs did not challenge the jurisdiction of the arbitrator pursuant to section 18(1) of the Act, they must be deemed to have waived their right to challenge the jurisdiction of the arbitrator. It is a fact that KL OS was only filed 284 days after the Kangar First Order and 12 days before the hearing of the arbitration.
>
> 49. In the circumstances, I agree that the failure of the plaintiffs to raise the issue of the composition of the arbitral tribunal pursuant to section 18 of the Act constitutes a waiver of the right to raise that issue in proceeding to set aside the arbitral award.
>
> 51. Accordingly, I am of the view that the plaintiffs have waived the right to set aside the arbitral award by raising the issue that the composition of the arbitral tribunal is not in accordance with the agreement of the parties.

[42] On the facts and the law, it is clear to us that the appellants had not complied with ss. 7 and 18(1) of the Act *ie*, to raise any objection before the arbitrator. Therefore, we find the learned High Court Judge did not err in deciding that due to the non-compliance with these provisions of the Act, the appellants had waived their right to object on the arbitrator's jurisdiction in the KL second OS. Accordingly, we find no merit in the second issue and the appeal on this ground must fail.

Third Issue

[43] The appellants applied to set aside the final award under s. 37(2)(b)(ii) of the Act which reads:

37(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

[44] The term "public policy" in the context of the Act has been discussed in detail by the Federal Court in the case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1. The principles that can be distilled from the said case are as follows:

(i) "Public Policy" are matters concerning public good and public interest;

(ii) To succeed in setting aside the award that was in conflict with the public policy of Malaysia, the applicant must show that the most basic notions of morality and justice would be offended by the award and that the conflict is injurious to the public good in Malaysia.

(iii) The concept of public policy under s.37 of the AA 2005 for the purpose of setting aside an award ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia.

(iv) Patent injustice, manifestly unlawful and unconscionable, substantial injustice, serious irregularity and other similar serious flaws in the arbitral process and award are instances where the upholding of the award is injurious to the public good and is in conflict of public policy in Malaysia.

[45] In this case, the appellants had admitted that there was no breach of natural justice during the arbitral proceeding or in connection with the making of the award. This admission is stated in para. 35 of the appellants' written submission at p. 2320 in encl. 21. For ease of reference, we reproduced para. 35 below:

35. It must be clarified at the outset that it is not our contention that the breach of rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award as provided under section 37(2)(b) of the Act.

[46] However, the appellants alleged the final award is in conflict with public policy due to the following reasons:

(i) There was serious irregularity in the Final Award as it was issued by the Arbitrator that was not appointed in accordance with clause 28.2 of the Agreement.

A (ii) It was patent injustice in the Arbitrator's finding that the Private Lands were rejected by the plaintiffs (appellants) on 14.4.2005 which is in conflict with his other finding that CW1 agreed that as at Mei 2005 there was no agreement or instruction to vary the terms of the Agreement.

B (iii) It was patent injustice in the Arbitrator's finding that the respondent was instructed by the appellants to look for alternative site and the respondent proposed Lot 284 as it was not supported by any evidence and in conflict with the respondent's own letter dated 18.5.2005 stating their difficulty to comply with the condition precedent.

C (iv) It was manifestly unlawful and unconscionable in the Arbitrator's finding that the condition precedent had been waived because the condition precedent was never complied with within the agreed period that caused the Agreement to be terminated.

(v) The decision of the Arbitrator that there was unlawful termination
D is substantial injustice.

[47] The very same reasonings in para. [41] above were raised and argued before the High Court and which the learned judge summed up as the appellants saying that the final award is manifestly erroneous because the arbitrator had misconstrued the facts of the case and made a wrong decision.
E It cannot be denied that the findings made by the arbitrator to which the appellants had labelled them as patent injustice, manifestly unlawful and unconscionable and substantial injustice are actually finding of facts. It is trite law that arbitrator is the master of facts and that the court has no jurisdiction to set aside an award on the ground of error of fact or law on the face of the
F award.

[48] In *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693, the Federal Court held:

> [115] … Error of fact or law on the face of the award 'is not prescribed
G as a ground for court intervention. Hence, under AA 2005, there is no jurisdiction to set aside an award on the ground of 'error of fact or law on the face of the award'.
>
> [153] Where it is a question of fact, "The arbitrators remain the masters of the facts. On an appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of
H the findings of fact of the Arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondence of the mistake of fact might be."

I

[49] After considering the facts and the law, the learned High Court Judge found that the appellants have not satisfied the criterion of "conflict with public policy". Therefore, the application to set aside the final award based on the ground of conflict with public policy was dismissed.

[50] We find the learned High Court Judge had not erred in Her Ladyship's finding that the element of "conflict with public policy" was not satisfied in this case. As rightly submitted by the respondent, we find the appellants have failed to explain in what way the final award is said to create patent or substantial injustice or is manifestly unlawful and unconscionable to the extent of conflicting against the public policy in Malaysia. We also find the appellants have failed to prove that the most basic notions of morality and justice would be offended by the award and that the conflict is something injurious to the public good in Malaysia. For these reasons, we find no merit in the third issue raised by the appellants.

Our Decision

[51] There is no merit in the appellants' appeal. The appeal is therefore dismissed.